Supreme Court, U.S.
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No. 91-1707

In The

Supreme Court of the United States

October Term, 1991

IN RE

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Petitioner

On Petition For Writ Of Mandamus, Prohibition Or Other Appropriate Remedy To The United States District Court Central District Of California

PETITIONER'S REPLY MEMORANDUM

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I.

WATERS' OPPOSITION SHOULD BE IGNORED BECAUSE IT INJECTS MATTERS OUTSIDE THE RECORD

Rule 28 of the Federal Rules of Appellate Procedure require that facts stated in appellate briefs be supported by "appropriate references to the record." Rule 28(e) provides that the record on appeal is contained in an "appendix" to be filed with the brief of the appellant. Likewise, Rule 20.3(a) essentially provides that the appendix to a writ petition comprises the record for purposes of petitioning for extraordinary writ.

In their opposition, Real Parties in Interest ["WATERS"] seek to obfuscate the *issues* raised in the petition for writ of mandamus *by injecting matters and "testimony" totally outside the record before this court*. For example, WATERS refer to testimony at a sanctions hearing on May 14 and 15, 1992, but fail to provide the court with any record to support their biased assertions. (Water's Opposition to Petition for Writ of Mandamus . . . dated May 22, 1992, at pp. 3, 17.)

II.

THE OPPOSITION SHOULD BE IGNORED AS IT FAILS TO CITE OR DISCUSS *TUCK v. USAA* AND *BAER v. USAA*, THE ONLY TWO FEDERAL DECISIONS DIRECTLY ON POINT

Nowhere in WATERS' twenty-two page Opposition to USAA's Petition for Writ of Mandamus do WATERS cite or attempt to distinguish *Tuck v. United Services Auto. Assn.*, 859 F.2d 842 (10th Cir. 1988) cert. den. 489 U.S. 1080

(1989) or *Baer v. United Services Auto. Assn.*, 503 F.2d 393 (2d Cir. 1974). In *Tuck* and in *Baer* federal appeals courts ruled that USAA, the very litigant involved in this case, is not a corporation and cannot be sued in federal court pursuant to federal diversity jurisdiction. (*Tuck, supra,* 859 F.2d 844 to 845; *Baer, supra,* 503 F.2d at 395.)

Since the Opposition to the Petition for Writ of Mandamus fails to discuss or distinguish the two dispositive cases holding squarely that this litigant, USAA, is *not a corporation* and cannot be sued as a corporation pursuant to diversity jurisdiction, the brief in opposition to the petition for writ filed by WATERS is incomplete, unpersuasive, and must be ignored.

III.

WATERS' ARGUMENT THAT USAA IS A CORPORATION UNDER TEXAS STATE LAW MUST BE SUMMARILY REJECTED

WATERS' argument that USAA is a corporation under Texas state law must be summarily rejected because it has been judicially determined that USAA is *not* a corporation for diversity purposes. (*Tuck, supra,* 859 F.2d at 844 to 845; *Baer, supra,* 503 F.2d at 395.) In fact, the Court of Appeals in *Baer* examined the statutes of the State of Texas and specifically determined that USAA was not a corporation under the laws of the State of Texas.

Moreover, WATERS themselves never alleged in their complaint that USAA was "a corporation" under the laws of Texas or any other authority. (See, Waters' Complaint at A-34 ("Defendant, UNITED SERVICES AUTOMOBILE

ASSOCIATION ("USAA"), is, and at all times herein mentioned was a domestic reciprocal insurance company with its principal place of business in the State of Texas.").)

WATERS' argument in Opposition to the Petition for Writ, that USAA is a corporation for diversity purposes, is erroneous, misleading and incomplete. This precise issue was considered on its merits by Judge Nelson of the Ninth Circuit Court of Appeals and was emphatically rejected. (See Appendix at pp. A-15 to A-17.) Indeed, WATERS have not cited a single Texas case to support their assertion that Texas law deems inter-insurance exchanges to be corporations. WATERS have, moreover, failed to advise this Court that Texas case authority is to the contrary. (See, e.g., *Highway Ins. Underwriters v. Reed*, 221 S.W.2d 925, 926 (Tex.Civ.App. 1949).)

IV.

CONCLUSION

The District Court's incorrect imposition of diversity jurisdiction in this case cannot await reversal on appeal. USAA and other reciprocal insurance associations are left by the District Court's decision in grave jeopardy.

The plea for the urgent need for mandamus relief is poignantly stated in the impartial observation of Circuit Judge Nelson:

> "For the reasons stated above, I believe that *USAA* has stated not only a justiciable claim for extraordinary relief by mandamus, it *has stated a compelling case* for our doing so. The inevitably futile result which will follow months from now

dictates that we rule on the jurisdictional issue at this point, rather than many months and much labor from now." (Appendix to Petition for Writ of Mandamus at p. A-19, emphasis added.)

DATED: June 8, 1992.

Respectfully submitted,

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